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Office of Administrative Law Judges
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Issue Date: 23 June 2004

CASE NO.: 2003-LHC-01550

OWCP NO.: 14-134274

In the Matter of:

DENNIS GRUGINSKI,
Claimant,

vs.

ARMY & AIR FORCE EXCHANGE SERVICE,
Employer,

and

CONTRACT CLAIMS SERVICES, INC.,
Carrier.

Appearances: Kenneth J. Shakeshaft, Esquire
For the Claimant

Matthew R. Lavery, Esquire
For the Employer/Carrier

Before: Jennifer Gee
Administrative Law Judge

DECISION AND ORDER GRANTING DISABILITY BENEFITS

INTRODUCTION

This is an action filed by Dennis Gruginski, the Claimant, for benefits under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901 *et seq*. ("the Act"), as extended by the Nonappropriated Fund Instrumentalities Act, 5 U.S.C. §§ 8171 *et seq*., for an injury he suffered on October 31, 2000, while working for the Army & Air Force Exchange Service (AAFES), the Employer. This matter was initiated with the Office of Administrative Law Judges ("OALJ") on April 7, 2003, when it was referred to the OALJ for formal hearing by the District Director of the Office of Workers' Compensation Programs.

For the reasons set forth below, the Claimant is granted temporary total and temporary partial disability benefits.

PROCEDURAL BACKGROUND

This matter was heard in Colorado Springs, Colorado, on August 21, 2003. The Claimant, his counsel, and counsel for the Respondents all appeared and participated in the trial. At the trial, ALJ Exhibits 1-2 were admitted, as were the Claimant's exhibits ("CX") 1-23 and the Employer's Exhibits ("EX") 1-15, 17-35, 36 (all but pages 4-5), 37-40, and 42-43. The Employer's Exhibits 16, 36 (pages 4-5), and 41 were excluded. After the trial was concluded, the parties submitted post-trial briefs which were received on October 20 and 21, 2003.

ANALYSIS AND FINDINGS

Issues:

The following issues are pending in this case:

1. The Date the Claimant Reached Maximum Medical Improvement
2. The Availability of Suitable Alternative Employment for the Claimant
3. The Claimant's Diligence in Seeking Alternative Employment
4. The Claimant's Entitlement to Disability Benefits
5. The Claimant's Retained Earning Capacity

Factual Background

The Claimant, who was born in 1954 (HT, p. 34), worked as an automotive worker for the Employer, Army & Air Force Exchange Service, for approximately three to four months before he was injured. (HT, p. 229-30.) His duties as an automotive worker included installing car batteries and performing oil changes as well as changing, mounting, and balancing tires. (HT, p. 230; CX 19, p. 292-93.)

On October 31, 2000, while the Claimant was working at the Employer's Academy Shoppette, his feet were wet with snow and his right foot slipped back on a wet tile floor, causing him to fall forward onto his extended right arm. Immediately after the fall, the Claimant experienced discomfort in his right arm, which he later reported progressed up the back of his neck, and led him to experience headaches on a daily basis. (CX 22, p. 299; EX 28, p. 3; EX 27, p. 1; EX 34, p. 1; EX 31, p. 1; EX 44, p. 2.) At work the next day, November 1, 2000, the Claimant complained of his neck pain and headaches, but was not released from work to seek medical attention until six and a half hours later, due to the work demands at the Academy Shoppette. (EX 27, p. 1.) He never returned to his automotive worker position at the Academy Shoppette. (EX 31, p. 3.)

The Claimant sought medical treatment on November 2, 2000, at Mountain View Medical Group, complaining of pain in his right shoulder, right neck, right upper trapezius, right upper back and left lower back. The Claimant described his pain as dull aching while at rest, but stabbing while in motion. The Claimant was treated by the physician's assistant to Dr. Wuerker, Joseph M. Kelly, who noted tenderness and a slight spasm of the Claimant's trapezius muscle. He put the Claimant's right arm in a sling, prescribed him Naprosyn and Flexeril, and advised

him not to lift anything over 5 pounds with his right arm. (EX 32, p. 8.) On November 9, 2000, the Claimant returned to the clinic and complained that his shoulder, neck and head continued to ache. (EX 32, p. 9.) Again, on November 16, 2000, the Claimant complained of persistent right shoulder pain with radiation up the back of the head to the occipital area. (EX 32, p. 10.) Mr. Kelly then referred the Claimant for a consultation with Dr. Wuerker. (EX 27, p. 1.)

The Claimant was evaluated by Dr. Wuerker on November 27, 2000, at Broadmoor Medical Clinics Briargate, for his right shoulder pain, headaches, and numbness in his right hand. Dr. Wuerker diagnosed the Claimant with a right shoulder strain, myofascial pain of the right side of the neck, and cephalgia due to shoulder and neck pain. Dr. Wuerker gave the Claimant a lifting restriction of 10 pounds and instructed him not to lift above his chest level. He also advised the Claimant to take 5 minute stretch breaks every 30 minutes and prescribed Celebrex, Naprosyn and physical therapy. (EX 26, p. 1; EX 32, p. 1-2.) The Claimant returned to Broadmoor on December 1, 2000, and was evaluated by another doctor,[1] who instructed him not to reach "crosstable" or "above shoulder." At this visit, the Claimant was prescribed Celebrex and Darvocet in addition to physical therapy. (EX 26, p. 2.)

On December 4, 2000, the Claimant was evaluated by Dr. Wuerker, who agreed with the instructions Claimant had been given not to reach "crosstable" or "above shoulder." After noting that the Claimant suffered tenderness in the right trapezius muscle and that his right shoulder had decreased range of motion, Dr. Wuerker opined that the Claimant could have suffered a labral tear of the shoulder. Dr. Wuerker advised the Claimant to take 10 minute stretch breaks every 60 minutes. He also authorized the Claimant to work six hours per day. He once again prescribed the Claimant Celebrex and physical therapy (EX 26, p. 3; EX 32, p. 3), and referred the Claimant to Dr. David M. Weinstein for an orthopedic evaluation of the right shoulder.

On January 12, 2001, Dr. Weinstein examined the Claimant, who complained of severe headaches and aching in the anterosuperior aspect of his shoulder, the right and midline of his neck, and his right trapezius. Dr. Weinstein noted that the Claimant had right and left paracervical tenderness and also tenderness in his right trapezius and scapular rotators. Dr. Weinstein interpreted the results of an MRI scan of the Claimant's right shoulder and reported that the Claimant suffered from supraspinatus tendinosis. Dr. Weinstein summarized that the Claimant suffered from right rotator cuff tendonitis and right cervical spine pain and instructed the Claimant against overhead use of his right arm. (EX 28, p. 2-4.)

On January 24, 2001, Dr. Wuerker reported that the Claimant suffered from neck and back tenderness at C6-7, and continued to experience tenderness in the right upper trapezius. Dr. Wuerker also noted that the Claimant appeared frustrated at his inability to improve. The Claimant's diagnosis was amended to include "Cervical Strain" and the Claimant was advised to take a 5 minute stretching break after every 30 minutes of physical activity. The Claimant was instructed not to use his right arm for more than 4 hours per day. He remained on Celebrex and continued physical therapy. (EX 26, p. 4; EX 32, p. 4.)

[1] The doctor's signature is illegible, but does not match the signature of Dr. Wuerker.

On January 25, 2001, Dr. Weinstein again evaluated the Claimant and referred him to Dr. Timothy V. Sandell for an evaluation and treatment of the Claimant's cervical spine pain. (EX 28, p. 1.)

On February 7, 2001, the Claimant complained to Dr. Wuerker of his continual headaches but reported that his shoulder felt slightly better. Dr. Wuerker requested a specialist referral so that an MRI of the Claimant's head could be accomplished. The MRI showed "nonspecific findings." (EX 31, p. 2.) Dr. Wuerker advised the Claimant to take a 5 minute break for every 30 minutes of activity and prescribed him Ultram. (EX 26, p. 5; EX 32, p. 5.) Dr. Wuerker also referred the Claimant to Dr. Sandell.

At the Claimant's first evaluation by Dr. Sandell on February 16, 2001, he complained of pain in the mid cervical region radiating to the occipital area and causing headaches that last up to three days. Dr. Sandell found the Claimant to have a decreased range of motion in the cervical spine and tenderness over the cervical paraspinal muscles. He also found the Claimant to have slightly decreased sensation in his right forearm and slightly decreased reflexes in his right triceps. The Claimant stated that his initial shoulder pain had reduced as a result of his physical therapy program, but that he was still experiencing cervical pain and headaches. Dr. Sandell recommended that the Claimant continue with physical therapy visits but have the emphasis shifted from his shoulder to his cervical region. (EX 31, p. 1-4.)

On February 19, 2001, the Claimant returned to Dr. Wuerker, still complaining of daily headaches and neck pain. Dr. Wuerker noted that the Claimant had tenderness in the posterior aspect of his neck. The Claimant was instructed to continue taking 5 minute breaks for every 30 minutes of activity. (EX 26, p. 6; EX 32, p. 6.)

On March 5, 2001, the Claimant complained to Dr. Wuerker that his neck was hurting more than usual and that he was experiencing increasing headaches. The Claimant expressed frustration that he could not get the pain symptoms under control or be seen by a specialist in a timely manner. Dr. Wuerker noted the Claimant's neck showed a point of tenderness over the C-6 posterior spinal process and in the paraspinal muscles of the cervical spine. The Claimant was prescribed Midrin and instructed to continue with physical therapy 3 times a week. (EX 26, p. 7; EX 32, p. 7.)

On March 7, 2001, Dr. Sandell again evaluated the Claimant, who continued to complain of neck pain and headaches. The Claimant reported that although the physical therapy treatment was helping, he still found his pain to increase with increased activity. He explained that when he tried to "push himself" by working four days in a row, his symptoms increased. Dr. Sandell reported that the Claimant's headaches generate from his cervical region and radiate into the occipital area. He also reported that the Claimant experienced tenderness in the C6 and C7 spinus processes and gave the Claimant a cortisone injection to numb the area. (EX 31, p. 6-7.)

On March 15, 2001, the Claimant returned to Dr. Sandell and reported that he felt relief from the cortisone injection, but that its effects were beginning to wear off. Although Dr. Sandell noted that the Claimant still experienced focal tenderness over the C6-7 processes, he reported that the Claimant's range of motion had increased. Dr. Sandell gave the Claimant a second cortisone injection at this visit. (EX 31, p. 9.)

On March 22, 2001, Dr. John T. McBride, Jr., conducted an independent medical examination of the Claimant. Dr. McBride diagnosed the Claimant with rotator cuff tendonitis, a cervical strain, and headaches, which he opined were "probably cervicogenic in origin." (EX 27, p. 3.) Dr. McBride reported that the Claimant's rotator cuff tendonitis was resolving and that a physical therapy hardening program would even further benefit the Claimant. At the time of the independent medical examination, Dr. McBride found that the Claimant could increase his daily work time from four to six hours. Dr. McBride concluded his report by opining that the Claimant's cervical pain and headaches were caused by his October 31, 2000, injury. (EX 27, p. 3-4.)

On March 23, 2001, the Claimant was examined by Dr. Sandell and notified him that his headaches were decreasing in frequency and that the last cortisone injection provided him with some relief. Dr. Sandell reported that the Claimant was progressing with physical therapy and instructed him to continue once a week for the next three weeks. Dr. Sandell kept the Claimant's 10 pound lifting and 4 hour workday restrictions but advised the Claimant that he could increase his workday to 6 hours if he could tolerate doing so. (EX 31, p. 10.)

On April 12, 2001, the Claimant returned to Dr. Sandell, and complained of neck pain when he extends his cervical spine. Dr. Sandell reported the Claimant's continued tenderness over the lower cervical sinus processes and proceeded with a third cortisone injection. Dr. Sandell prescribed the Claimant Vioxx, kept the 10 pound lifting restriction, and approved the Claimant to work between 4 and 6 hours per day. (EX 31, p. 13-14.)

On April 27, 2001, Dr. Sandell evaluated the Claimant and reported that he was improving on a gradual basis. He advanced his work restrictions to a maximum of 20 pounds of lifting and frequent lifting up to 10 pounds. He also raised his workday restrictions to 5-7 hours per day with 10 minute breaks every 90 minutes. (EX 31, p. 16.)

On May 25, 2001, the Claimant returned to Dr. Sandell, complaining of increased neck pain and headaches since attempting to work seven hour days. Dr. Sandell prescribed Skelaxin, but kept the Claimant's work restrictions at seven hour days. (EX 31, p. 17-18.)

On June 26, 2001, the Claimant returned to Dr. Sandell and stated that his neck pain was improving, especially after taking Flexoril that was given to him by a friend. Dr. Sandell gave the Claimant a prescription for Flexoril and increased his work restrictions to 6-8 hour days with 10 minute breaks every 90 minutes, and lifting restrictions of 40 pounds maximum and 25 pounds for frequent lifting. (EX 31, p. 19-20.)

On July 18, 2002, the Claimant and the Employer participated in an Informal Conference before a Claims Examiner of the OWCP. On July 26, 2002, the Claims Examiner issued a recommendation that the Employer pay an outstanding medical bill for the Claimant, that the parties work together to calculate the Claimant's actual time loss at issue, and that the Claimant, after obtaining results of a labor market survey conducted by the Employer, pursue a job search. (EX 15, p. 1-2.)

On July 26, 2001, the Claimant reported to Dr. Sandell an increase in neck pain and headaches following an incident at work when he attempted to pull a box off a shelf. Dr. Sandell kept the Claimant on the same work restrictions but prescribed him Norflex. (EX 31, p. 22.)

On August 24, 2001, the Claimant complained to Dr. Sandell that his headaches and neck pain were increasing and becoming intolerable. At the visit, Dr. Sandell reported that the Claimant had tenderness along the midline of the cervical spine as well as pain with extension and rotation. Dr. Sandell kept the Claimant on the same work restrictions but prescribed him Midrin. He referred the Claimant to Dr. Lippert. (EX 31, p. 25-26.)

On September 19, 2001, Dr. McBride again evaluated the Claimant, finding the Claimant to have "exquisite tenderness to palpation at the muscular insertions of the muscles on the occipital bone and also tenderness to palpation in the C7 spinous process area." (EX 27, p. 6-7; CX 15, p. 255-56.) Dr. McBride diagnosed the Claimant with myofascial neck pain, as opposed to the previously diagnosed cervical radicular neck pain, and opined that this myofascial process should respond to adequate core stabilization and strengthening programs. Dr. McBride recommended that a nuclear medicine bone scan be carried out to evaluate whether any ligamentous injury occurred, or if there were any cervical changes to the Claimant's posterior cervical spine. Dr. McBride recommended that the Claimant see a neurologist for his severe headaches and advised against increasing the Claimant's work because of his headaches and objective myofascial pain. (EX 27, p. 7-8; CX. 15, p. 256-67.)

The Academy Shoppette facility manager, Jefferey Willis, reported that the Claimant had been repeatedly absent from work due to headache pain, and that he never called in or worked after September 20, 2001. (HT, p. 233-34; EX 8, p. 1-9.) Mr. Willis reported that after the Claimant's injury, he attempted to accommodate him by first having him "face shelves"[2] (HT, p. 55), and later arranging for him to work as a cashier. (CX 18, p. 290.) After attempting the cashier position however, the Claimant complained that it was beyond his lifting restrictions (HT, p. 56-57), and that the sunlight shining on him through the bay window was worsening his headache pain. (HT, p. 42; EX 39, p. 44.) The Claimant also attempted an I.D. checker position, checking customer identifications, but complained that lowering his head to look at the I.D.'s strained his neck. (HT, p. 96.) According to the Claimant, his headaches became unbearable in September 2001, causing him to request a leave of absence without pay. (HT, p. 57-58.)[3]

On November 20, 2001, Dr. Sandell evaluated the Claimant, who continued to complain of ongoing neck pain and headaches every day. The Claimant explained that after Dr. Sandell referred him to Dr. Lippert, Dr. Lippert gave him two sets of facet injections, which did not improve his symptoms. At this visit, the Claimant expressed frustration with his ongoing symptoms and complained that he was not able to work. Dr. Sandell reported that he would refer the Claimant for a bone scan to look for a focal bony abnormality or inflammation of the cervical spine. Due to the Claimant's increased symptoms and insistence that he could not tolerate working, Dr. Sandell took the Claimant off of work. He also placed the Claimant on a trial

[2] The Claimant defined "fac[ing] shelves as "bring[ing] back product to the front of the shelves." (HT, p. 55.)

[3] Although both the Claimant and Mr. Willis reported that the Claimant did not work for the Employer after September 20, 2001, there are subsequent unexplained references in the Claimant's treating doctors' clinical notes that indicate the Claimant complained of symptoms resulting from the duties of his cashier position. (EX 31, p. 27-29; EX 33, p. 1.)

prescription of Amitryptyline to help him sleep and also to help with his severe headache pain. (EX 31, p. 27-29.)

On December 26, 2001, the Claimant was evaluated by Dr. Sandell, who discussed the results of the Claimant's bone scan. The scan did not show increased uptake in the Claimant's cervical spine but did identify mild degenerative changes in his shoulder and sternoclavicular joints. Dr. Sandell returned the Claimant to work, increased his prescription for Amitriptyline, and lowered his maximum lifting restriction to 30 pounds. (EX 31, p. 30-31.)

On January 3, 2002, the Claimant was examined by Dr. Laurence J. Adams, Jr. and complained that his job as a cashier at the Air Force Academy was requiring him to do more lifting than he was capable of doing. (EX 33, p. 1.)

On January 8, 2002, the Claimant returned to Dr. Sandell and complained of a constant pressure sensation in his occipital area. Dr. Sandell prescribed the Claimant Topomax and took him off work until he could have a Functional Capacity Evaluation ("FCE") and a Job Site Evaluation. (EX 31, p. 33-35.)

On January 17, 2002, the Claimant had an FCE, which established his ability to work at the Light-Medium Physical Demand Level for an eight hour day. (CX 17, p. 261) The results of the examination indicated that the Claimant could frequently stand, walk and reach overhead but that he could only occasionally bend, squat, kneel and climb stairs. (CX 17, p. 263.) The report also stated that the Claimant did not demonstrate symptom or disability exaggeration behavior, and that he gave an excellent effort. (CX 17, p. 261, 285, 289.)

On February 5, 2002, a Job Site Evaluation was conducted of the Claimant's working environment as a cashier. The evaluator reported that there was no chair available for sitting and that the cashier, in carrying out his duties, had to bend down or squat to locate videos rented by customers. (CX 18, p. 290.) In addition, the evaluator noted that the cashier, while bagging purchased items, performed shoulder abduction and flexion, and placed a static load on his upper trapezius. The evaluator further noted that his own eyes were strained as he performed the evaluation because there was a "significant amount of glare from the sunlight coming through the large south facing windows in the store." The evaluator concluded that the main concern was the tremendous amount of glare in the store, which he opined could be causing the Claimant to squint, strain his eyes and tighten his cervical muscles, and thereby experience severe headaches. (CX 19, p. 291.)

On February 26, 2002, Dr. Sandell met with the Claimant to review the FCE findings. Based on the results, Dr. Sandell changed the Claimant's work restrictions to 35 pounds maximum lifting; occasional bending, squatting, kneeling, stair climbing and overhead reaching; frequent sitting, standing and walking; and no ladder climbing or crawling. Dr. Sandell clarified that although he was listing new restrictions based on the FCE, the Claimant still had not reached maximum medical improvement. (EX 31, p. 36.)

On February 27, 2002, Dr. Sandell reported that he would be in support of providing a sunlit filtering screen in the Claimant's workplace so as to decrease glare that may be contributing to his headaches. He also indicated that he would support lowering the counter

where the Claimant bags items and giving the Claimant a high stool so that he could easily change from a sitting to a standing position. (EX 31, p. 37-38.)

On April 18, 2002, the Claimant was examined by Dr. Sandell, who found that there was no change in his condition. The Claimant identified his primary problem to be his headaches. Dr. Sandell reported that the Claimant should receive vocational rehabilitation so that he may be put in a working position that does not cause flare-up of his neck pain and headaches. (EX 31, p. 40.)

On June 20, 2002, the Claimant was examined by Dr. Sandell, who again noted that the Claimant's condition had not changed. The Claimant notified Dr. Sandell that a vocational rehabilitation evaluation had been conducted by Bruce Magnuson. Dr. Sandell reported that he anticipated the Claimant would reach maximum medical improvement after having a neurology evaluation. (EX 31, p. 42.)

On August 13, 2002, Dr. Adams evaluated the Claimant and found him to still be tender over his left occipital nerve. Dr. Adams increased the Claimant's prescription of Topomax and started him on Klonopin to help with his pain and inability to sleep. (EX 33, p. 2.)

On August 20, 2002, the Claimant was evaluated by Dr. Sandell and stated that he had no change in symptoms. Dr. Sandell reported that the Claimant was approaching maximum medical improvement and that his work restrictions likely would not vary from those already in place. (EX 33, p. 43; CX 14, p. 251.) On August 20, Dr. Sandell also completed a form prepared by the Claimant's counsel and checked "Yes" underneath the statement: "Due to chronic headaches and injuries, Mr. Dennis Gruginski should be placed in a low stress job environment." (CX 14, p. 250; EX 43, p. 6; EX 31, p. 44.)

On September 20, 2002, Dr. Adams noted that the Claimant continued to experience insomnia. However, Dr. Adams reported that the Claimant was able to sleep somewhat better as a result of the recently prescribed Klonopin. For the Claimant's complaints of continued tenderness over his left occipital notch, Dr. Adams referred him to Dr. Ronald M. Laub, whose treatment approach involves use of an occipital stimulator. (EX 33, p. 3.)

On October 2, 2002, the Claimant was evaluated by Dr. Sandell and stated that his symptoms were the same. Dr. Sandell then referred the Claimant to Dr. Laub for a one-time evaluation in consideration of an occipital stimulator. Dr. Sandell reported that after the completion of Dr. Laub's evaluation, he anticipated the Claimant would be at maximum medical improvement. (EX 31, p. 45.)

On October 23, 2002, Dr. Laub, after evaluating the Claimant, reported that the Claimant's daily headaches were "originating in the suboccipital area and in the neck with radiation into the posterior and lateral aspect of the occiput and temple." Dr. Laub noted that the Claimant was sent to him solely for suboccipital stimulation and that if the Claimant stopped smoking for one month, he would be an excellent candidate for the stimulation. (EX 34, p. 1-2.)

On November 8, 2002, the Claimant met with Dr. Sandell and stated that his symptoms remained unchanged. He complained that the Ultram he was prescribed makes things "fuzzy" and that he therefore was not driving when on the medication. (HT, p. 39.) Dr. Sandell reported

that, if the Claimant decided to pursue the occipital stimulator treatment, he would support its trial. (EX 31, p. 47.)

On November 20, 2002, Dr. Sandell issued a restriction for the Claimant, recommending that he refrain from driving after taking Ultram. Dr. Sandell noted that the Claimant only takes the Ultram as needed. (EX 31, p. 46; HT, p. 106.)

On January 9, 2003, the Claimant was evaluated by Dr. Sandell and complained of more difficulty dealing with chronic pain. The Claimant attempted to return to work, but after working for only four hours, experienced neck pain and headaches. Dr. Sandell suggested that the Claimant undergo psychological counseling, which he agreed to consider. (EX 31, p. 48.)

On February 7, 2003, Dr. Sandell addressed a letter to both the Claimant and Bruce Magnuson, indicating that he would no longer review requests to modify the work restrictions he imposed on the Claimant on February 26, 2002. He stated that he had been used as a "go-between" for the Claimant and Mr. Magnuson and that he would no longer respond to their requests that he review jobs or adjust work restrictions for the Claimant. Also, in response to the Claimant's request for a stress restriction, he stated "there are few, if any, jobs in the world today that do not involve some level of stress. I don't feel there is any reasonable and objective way to make a work restriction related to stress." (EX 31, p. 49-50; CX 14, p. 253-54; HT, p. 85.)

On April 1, 2003, the Claimant began a job with Fidelity Realty as an apartment manager at Park Meadows Apartments, with earnings of $458.00 per month, which covered his rent in the complex. (HT, p. 44.)

On April 9, 2003, Dr. Sandell evaluated the Claimant, who reported that he had obtained an apartment manager position. The Claimant still complained, however, of persistent headaches and neck pain with radiation into the left shoulder. Dr. Sandell reported that the Claimant suffered moderate tenderness in the left cervical paraspinal muscles, left levator scapulae and left upper trapezius. Dr. Sandell refilled the Claimant's prescriptions of Ultram, Elavil, and Clonazepam. Dr. Sandell further reported that the Claimant had not undergone occipital stimulator placement, but because his headaches were increasing extensively, he was considering the aggressive intervention. (EX 31, p. 51.)

On July 1, 2003,[4] the Claimant commenced real estate school at Jones Real Estate College. (HT, p. 46.) He attended school five days per week, from 9:00 a.m. until 3:00 p.m., and completed two to three hours of homework per night. (HT, p. 47-48.)

1. The Date the Claimant Reached Maximum Medical Improvement

The traditional method for determining whether an injury is permanent or temporary is by determining the date of maximum medical improvement. *Stevens v. Lockheed Shipbuilding Co.*, 22 BRBS 155, 157 (1989); s*ee also Turney v. Bethlehem Steel Corp.*, 17 BRBS 232, 235, fn. 5 (1985); *Trask v. Lockheed Shipbuilding and Constr. Co.,* 17 BRBS 56, 60 (1985). The date of maximum medical improvement is a question of fact based upon the medical evidence of record.

[4] The Claimant also testified that he commenced real estate school on June 17, 2002, and passed the Colorado real estate exam on July 24, 2002, HT, p. 126, but he appears to have completed it in 2003.

L.A. Ins. Guar. Assoc. v. Abbott, 40 F.3d 122 (5th Cir. 1994); *Ballesteros v. Willamette Western Corp.*, 20 BRBS 184, 186 (1988); *Williams v. General Dynamics Corp.*, 10 BRBS 915, 918 (1979). Where the medical evidence indicates that a claimant's condition is improving and the treating physician anticipates further improvement in the future, a claimant has not yet reached maximum medical improvement, and, thus, the claimant's condition is considered temporary. *Dixon v. Cooper Stevedoring Co.*, 18 BRBS 25, 32 (1986). However, when a claimant's condition has stabilized, he has reached maximum medical improvement, and thereafter his disability is considered permanent. *Cherry v. Newport News Shipbuilding & Dry Dock Co.*, 8 BRBS 857, 861 (1978); *Thompson v. Quinton Enterprises, Ltd.*, 14 BRBS 395, 401 (1981).

In determining the date of maximum medical improvement, an ALJ must consider medical opinions of record, rather than economic factors, such as the loss of a job, a return by a claimant to employment, or the likelihood of a favorable change in employment. *Thompson v. McDonnell Douglas Corp.,* 17 BRBS 6, 9 (1984); *Bonner v. Ryan-Walsh Stevedoring Co.,* 15 BRBS 321, 324 (1983); *Williams,*10 BRBS at 918 (1979). If the record contains no medical documentation specifying a date of maximum medical improvement, the ALJ may base the determination on the date a physician rated the extent of the injured worker's permanent impairment. *See Jones v. Genco, Inc.,* 21 BRBS 12, 15 (1988).

In this case, there is no medical documentation indicating that the Claimant ever reached maximum medical improvement. In fact, to the contrary, there are numerous medical reports specifically indicating that the Claimant had not, at the time of each report, reached maximum medical improvement.

Dr. McBride, who conducted an independent medical examination of the Claimant on March 22, 2001, found that the Claimant had not reached maximum medical improvement. However, he suggested that with an active rehabilitation program, the Claimant's pain would resolve. (EX 27, p. 4.) It never did.

As demonstrated below, the claimant's treating physician, Dr. Sandell, also anticipated that the Claimant would reach maximum medical improvement after the occurrence of certain events. However, Dr. Sandell never found that the Claimant achieved maximum medical improvement, even after the events occurred.

On August 1, 2001, almost one year after the Claimant's injury, Dr. Sandell clarified the Claimant's status for Jeffrey Knipper, a Claims Supervisor at Contract Claim Services, Inc., by stating, "If [the Claimant] is not making further improvement in regards to returning to his regular duties, then we may have to consider placing him on more permanent work restrictions. I consider his current work restrictions temporary." (EX 31, p. 24.)

Months later, in his November 20, 2001, and January 8, 2002, medical reports, Dr. Sandell stated that he planned to request an FCE in order to determine permanent work restrictions for the Claimant. (EX 31, p. 28, 34.) However, on February 26, 2002, after the FCE had been conducted, Dr. Sandell issued a report with work restrictions for the Claimant and stated, "I anticipate these will be [the Claimant's] permanent work restrictions. He is not at MMI as yet. I will not place him at MMI until he has completed his evaluation through the

neurologist." (EX 31, p. 36.) Dr. Sandell stated this requirement that the Claimant see a neurologist, despite the fact that the Claimant had just been evaluated by Dr. Adams, a neurologist, on January 3, 2002. (EX 33, p. 1.)

On March 19, 2002, Dr. Sandell made clear his opinion of the Claimant's temporary disability status by stating, "I have not yet placed the patient at MMI. I will not place him at MMI until he has completed his evaluation through the neurologist. (EX 31, p. 39.) Again on April 18, 2002, Dr. Sandell explained that even though he planned to continue the Claimant on the same work restrictions, "I do not think [the Claimant] would be at MMI until he completes a neurologic evaluation." (EX 31, p. 40.) Still again, on June 20, 2002, Dr. Sandell stated, "we are anticipating placing [the Claimant] at MMI once the neurologic evaluation is completed through a neurologist regarding his headaches." (EX 31, p. 42.)

After his June 20, 2002, report, Dr. Sandell did not again mention the need for the Claimant to be evaluated by a neurologist before a determination of maximum medical improvement. Instead, on August 20, 2002, he stated "I do feel we are approaching MMI… I will see him back in one month. If his condition remains stable, I will likely place him at MMI and address permanent work restrictions and impairment." (EX 31, p. 43.)

On August 7, 2002, the Claimant's counsel sent Dr. Sandell a letter asking if the Claimant should be placed in a low stress job environment because of his headaches and symptoms. (CX 43, p. 5.) In response, on August 20, 2002, Dr. Sandell returned a form the Claimant's counsel prepared indicating the Claimant should be placed in a low stress job environment. (CX 14, p. 250; EX 31, p. 44; EX 43, p. 6.)

On October 2, 2002, Dr. Sandell again reported that the Claimant had not reached maximum medical improvement. In this report, he explained that he had referred the Claimant to Dr. Laub for an evaluation in consideration of an occipital stimulator and that, "Once this is complete, then I feel he will likely be at MMI." (EX 31, p. 45.) Then on November 8, 2002, Dr. Sandell reported that once it is determined whether the Claimant will pursue the occipital stimulator treatment, the MMI issue will be addressed. (EX 31, p. 47.) At his next evaluation by Dr. Sandell, on January 9, 2003, the Claimant still felt unsure as to whether he wanted to be treated with the occipital stimulator.

As outlined above, Dr. Sandell, the Claimant's treating doctor, never found that the Claimant reached maximum medical improvement although he reportedly anticipated making such a finding. Instead, Dr. Sandell cited in his medical reports conditions requiring fulfillment before he could find the Claimant at maximum medical improvement. However, even in instances where the conditions were fulfilled, Dr. Sandell still found new reasons to prevent a finding of maximum medical improvement.

Although a maximum medical improvement determination can be based on a claimant's permanent impairment when the record contains no medical documentation specifying a date of maximum medical improvement, *Jones v. Genco, Inc.,* 21 BRBS 12, 15 (1988), there is still no basis for such a determination here as no physician ever issued permanent restrictions for the Claimant. Instead, the Claimant's treating physician issued what he anticipated would become

the Claimant's permanent restrictions. (EX 31, p. 36.) In sum, there is no evidence in the medical records that the Claimant ever reached maximum medical improvement. Therefore, the Claimant is not entitled to any permanent benefits in this matter.

2. The Availability of Suitable Alternative Employment for the Claimant

Once a claimant establishes that after an injury, he is unable to do his usual work, he has established a *prima facie* case of total disability and the burden shifts to the employer to establish the availability of suitable alternative employment that the claimant is capable of performing. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1038 (5th Cir. 1981); *Caudill v. Sea Tac Alaska Shipbuilding*, 25 BRBS 92 (1991), *aff'd mem. sub nom., Sea Tac Alaska Shipbuilding v. Director, OWCP*, 8 F.3d 29 (9th Cir. 1993). To meet its burden, the employer must show the existence of realistic job opportunities the claimant is capable of performing, considering his age, education, work experience, and physical and mental restrictions. *Turner*, 661 F.2d at 1042-43.

In this case, after his injury on October 31, 2000, the Claimant never returned to his position as an automotive worker at the Academy Shoppette, as he was unable to perform his previous job duties. (HT, p. 55; EX 13, p. 1.) The Claimant did, however, work for the Employer in other capacities after his injury. Immediately after the injury and with his arm in a sling, the Claimant "fac[ed] shelves." (HT, p. 55.) Next, the Claimant worked as a cashier, checking out customers who were paying for items such as gas, liquor, food and video rentals. (CX 18, p. 290.) In that position, the Claimant complained that lifting cases of liquor was beyond his lifting restrictions at the time, and that even after the Employer designated his cash register as receiving payment for gas only, customers still expected him to ring up anything they placed on his counter. (HT, p. 56-57.) The Claimant complained further that he worked in front of a bay window that allowed sunlight to shine through on him and worsened his severe headache pain. (HT, p. 42; EX 39, p. 44.) The Claimant testified that he also attempted an I.D. checker position, but that lowering his head to look at the I.D.'s strained his neck. (HT, p. 96.) Despite his difficulties, the Claimant worked as a cashier for the Employer until finally his headaches became unbearable in September 2001. (HT, p. 57-58.)

By finding the Claimant the aforementioned onsite positions, the Employer attempted to satisfy its burden of establishing the availability of suitable alternative employment. However, its attempts to find the Claimant an onsite job within his capabilities were unsuccessful. The Employer then attempted to identify employment opportunities for the Claimant outside of its job base. The process started when Contract Claims Services, Inc. contacted Bruce Magnuson, a Certified Rehabilitation Consultant, on May 31, 2002, and requested that he conduct a labor market survey to determine the types of jobs available for the Claimant within his physical restrictions. (HT, p. 142; EX 11, p. 1-2; EX 35, p. 1-2; CX 7, p. 83.)

Bruce Magnuson

The Claimant was notified on July 2, 2002, that Mr. Magnuson was assigned as his vocational counselor. The Claimant was advised that as his vocational counselor, Mr. Magnuson would meet with him on a regular basis, help him identify alternative jobs, assist him in obtaining training to obtain employment if needed, assist him in job development and placement,

provide him with job leads, speak with employers, and assist him in applying for jobs. (EX 12, p. 1.)

After submitting an Initial Report to Contract Claims Services, Inc. on June 7, 2002, and then conducting an extensive labor market survey, Mr. Magnuson submitted 10 potential jobs to the Claimant on July 23, 2002, stating that he believed they were all within the Claimant's restrictions. (EX 44, p. 1-5; CX 5, p. 20.) Mr. Magnuson also submitted the 10 proposed positions to Contract Claims Services, Inc. on July 31, 2002. (CX 6, p. 81.) On August 30, 2002, Mr. Magnuson issued a follow-up report to Contract Claims Services, Inc., indicating that only four of the identified jobs were approved by Dr. Sandell, the Claimant's treating physician, and of those four, only two had immediate openings. The other jobs merely listed anticipated openings within the next 30 to 60 days. The two positions with openings were: Ramada Inn desk clerk and Super 8 Motel desk clerk. (HT, p. 148, 182-84; CX 3, p. 8; CX 7, p. 83-84.)

Mr. Magnuson conducted a second labor market survey from August 23, 2002, through September 3, 2002,[5] in which he identified five potential security jobs for the Claimant. He requested that Dr. Sandell review the job list to determine which jobs were within the Claimant's restrictions. Dr. Sandell approved all five of the security positions. (HT, p. 149-51; CX 3, p. 8-9; CX 8, p. 86-116; EX 36, p. 151.)

Mr. Magnuson conducted a third and final labor market survey for the Claimant and issued a report with its findings to Contract Claims Services, Inc. on January 31, 2003. In his report, he identified 8 potential jobs for the Claimant and indicated that he was in the process of identifying 5 additional jobs, for a total of 13. The eight jobs listed were: appointment setter, customer service representative (two positions), customer service assistant, greeter, administrative assistant, cashier, and counselor in a group home. (EX 36, p. 98.) Mr. Magnuson submitted the job list to Dr. Sandell for approval. However, Dr. Sandell addressed a response to both Mr. Magnuson and the Claimant indicating that he would no longer review job descriptions for the Claimant and that he felt he was "being placed as a go-between." In his letter, Dr. Sandell explained that the Claimant is capable of performing jobs that fall within his imposed work restrictions. (EX 31, p. 49; CX 14, p. 253-54.) From this response, Mr. Magnuson concluded that all 13 of his proposed jobs would be approved as within the Claimant's means.

Mr. Magnuson testified that in his 7 months on this case, his office made approximately 120 phone calls to potential employers for the Claimant (HT, p. 146-47), but was only able to identify a total of 20 jobs[6] within the Claimant's restrictions: 2 desk clerk positions, 5 security guard positions, and these latter 13 miscellaneous positions.

[5] Although Mr. Magnuson testified that he conducted the labor market analysis from August 23, 2002, through September 4, 2002, it is clear that the analysis was completed by September 3, 2002, because Mr. Magnuson sent a report of his findings to Dr. Sandell on September 3, 2002.

[6] Mr. Magnuson actually testified that he located only 16 potential positions for the Claimant, but the total of 2 desk clerk positions plus 5 security guard positions and 13 miscellaneous positions is 20. (HT, p. 146-47, 193, 202, 208; CX 11, p. 122.)

Nora Dunne

On July 9, 2002, the Claimant's case was referred by the OWCP to Nora Dunne, a Certified Rehabilitation Counselor. Ms. Dunne was given instructions to provide counseling, guidance and placement services to the Claimant. (EX 14, p. 1; EX 37, p. 1; EX 39, p. 5.) Ms. Dunne used the services of Employ America, Inc. to identify jobs within the Claimant's physical restrictions, and the company found a total of 41 potential jobs. The list of results identified the top 5 jobs for the claimant as executive housekeeper, apartment house manager, airplane charter clerk, baby stroller and wheelchair rental clerk and bicycle rent clerk. (EX 39, p. 11-13.)

However, in her first and second vocational rehabilitation reports, on October 4 and November 8, 2002, respectively, Ms. Dunne only identified the job of executive housekeeper as being available and within the Claimant's restrictions,. (EX 39, p. 57-59; EX 38, p. 3.) In her third and fourth reports, on December 8 and December 31, 2002, respectively, Ms. Dunne again identified the position of executive housekeeper for the Claimant, and added only the position of front desk clerk. (EX 39, p. 65, 76; EX 38, p. 23, 26.)

Although Ms. Dunne identified the positions of executive housekeeper and front desk clerk as being suitable for the Claimant, she did not receive authorization and begin contacting potential employers for these positions until January 2, 2003. (EX 39, p. 103.) On January 6, 2003, Ms. Dunne provided two job leads for front desk positions to the Claimant, and the Claimant reportedly applied for both to no avail. (EX 39, p. 103-04.) Ms. Dunne acknowledged that even if a job applicant is qualified, he will not be able to obtain employment if there is no demand for his services. (EX 39, p. 75.) Later in January of 2003, Ms. Dunne was released of her duties on this case. (EX 39, p. 84.)

Martin L. Rauer

Martin L. Rauer, the Director of Rehabilitation Services at FasTrak Rehabilitation, met with the Claimant on December 26, 2002. At the initial meeting, the Claimant complained to Mr. Rauer about the placement assistance he had received to date. He explained that his vocational rehabilitation counselor from the OWCP, Nora Dunne, was not following through on her duty to provide him with specific job leads and that he was anxious to receive placement assistance through FasTrak Rehabilitation. (CX 22, p. 297-98.)

After meeting with the Claimant and reviewing his records, Mr. Rauer found that, based on the Claimant's limited upper extremity capacity, the Claimant could have some skill transferability as an Apartment Manager or in a general supervision role, such as in the field of customer service. (CX 22, p. 304.) However, Mr. Rauer reported that he had reviewed about 35 positions selected through the Labor Market Access Plus Program and found the Claimant to be ineligible for at least 90% of those positions, due to his work restrictions. (CX 22, p. 305.)

Catherine Howard

In March 2003, Catherine Howard was contacted by the OWCP to work as the Claimant's new vocational rehabilitation counselor, and to develop a plan for either his

placement or retraining. (CX 24, p. 5, 7, 11.)[7] On March 4, 2003, Ms. Howard first met with the Claimant and provided him with three jobs leads: two for property management positions in Arizona and one for a position at a Sara Lee bread store. She proposed the position of executive housekeeper to the Claimant, but he responded that the job duties would be "too heavy." (CX 24, p. 45.) She also suggested hotel and security guard positions but the Claimant complained that he would have to be on his feet all day and expressed more interest in the property management positions. (CX 24, p. 47-50.) Ms. Howard took into consideration the interests of the Claimant in developing the vocational rehabilitation plan.

The Claimant reported that he applied for all of the jobs Ms. Howard proposed but was unsuccessful. (CX 24, p.11-13, 36, 44.) He learned that, despite his experience in property management, a real estate license was required for one of the real estate management positions he applied for. (CX 24, p. 37, 43.) Ms. Howard showed the Claimant how to use Colorado's Job Bank and the Yellow Pages, and from those tools, the Claimant was able to obtain his apartment manager position[8] at Park Meadows Apartments. Still, however, the Claimant wanted to pursue schooling to obtain a real estate license, as his Park Meadows position did not allow him to earn any money, but gave him an exchange of free rent. (CX 23, p. 311; CX 24, p. 36.)

Ms. Howard developed a rehabilitation plan for the Claimant with a two-part approach: first, job placement and second, training in real estate. (CX 13, p. 218-22; CX 24, p. 16-17.) She decided to allow the Claimant to pursue his schooling and justified her decision as reasonable "based on his work history and his interests and priorities and concerns." (CX 24, p. 61.) Ms. Howard's plan for the Claimant to enroll in school, to obtain his real estate license, was approved by Edward Cope, a Rehabilitation Specialist of the OWCP. (CX 13, p. 218-22.) Ms. Howard explained that she did not make an effort to locate additional front desk and security jobs for the Claimant to apply as it does not "do much good to try to pigeon-hold somebody into a job they don't want to do." (CX 24, p. 61.) Instead, Ms. Howard assisted in the Claimant's job search efforts with respect to property management positions, even though those positions could require the applicant to have a real estate license. (CX 24, p. 30.)

As demonstrated above, the Employer, through various vocational rehabilitation counselors, met its burden of establishing the availability of suitable alternative employment for the Claimant. Although the Employer was unable to show a multitude of job opportunities for the Claimant, it was able to show the existence of select jobs, for which the Claimant could apply.

3. The Claimant's Diligence in Seeking Alternative Employment

A claimant can rebut the employer's showing of the availability of suitable alternate employment and retain eligibility for total disability benefits, if he shows he diligently pursued alternative employment opportunities but was unable to secure a position. *Newport News*

[7] The deposition of Catherine Howard, presented by the Claimant, was not offered into evidence at the hearing on August 21, 2003, but was submitted with the Claimant's marked exhibits. It has now been marked as Claimant's Exhibit 24.

[8] Although on April 7, 2003, Ms. Howard identified the Claimant as obtaining the position "Property Manager" at Park Meadows Apartments, she later clarified on May 8, 2003, that he held the title of "Apartment Manager." (CX 23, p. 311.)

Shipbuilding & Dry Dock Co. v. Tann, 841 F.2d 540, 542 (4th Cir. 1988); *Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 691 (5th Cir. 1986), *cert. denied*, 479 U.S. 826 (1986). In this case, the evidence shows that the Claimant diligently pursued the employment opportunities presented to him, but was unsuccessful.

As discussed below, the evidence from the vocational rehabilitation counselors indicates that, for the most part, the Claimant was diligent in his pursuit of alternate employment.

Mr. Magnuson, the Vocational Rehabilitation Consultant first involved in this case, reported on September 30, 2002, that "the economic climate in Colorado Springs has declined significantly in the last year." Still however, after four separate labor market analyses, he found positions for which the Claimant could apply. In one instance, Mr. Magnuson referred the Claimant for a security guard position at Pinkerton Security. He later called and verified that the Claimant had applied and interviewed for the position, but was not selected for the job. (HT, p. 153-54.) In fact, Mr. Magnuson acknowledged that the Claimant promptly applied for all but one of the approved positions he recommended, as well as jobs the Claimant identified on his own.[9] (HT, p. 194-96.) He further found it reasonable that the Claimant purchased a computer program to assist him in writing his resumes and cover letters.[10] (HT, p. 197.)

The Claimant testified that although he applied for all of the positions that were referred to him by Mr. Magnuson and approved by Dr. Sandell, he was unsuccessful in each endeavor. (CX 9, p. 117; HT, p. 59.) The Claimant then, on his own,[11] obtained a job as a front desk clerk at Econolodge, but found his duties of folding sheets and cleaning to exacerbate his symptoms. (HT, p. 67, 100, 185, 197; EX 43, p. 1.) Mr. Magnuson's summary in his August 30, 2002, report may help to explain the reason for the Claimant's lack of success in obtaining alternative employment. He noted, "Mr. Gruginski appears motivated…" (CX 7, p. 85) but "is essentially unskilled" and "his work experience has been generally unskilled in nature." (CX 7, p. 84.)

Ms. Dunn, the Certified Rehabilitation Counselor who next took on the Claimant's case, provided two job leads to the Claimant on January 6, 2003, for front desk positions. The Claimant reported that he applied for both positions but was hired for neither. (EX 39, p. 103-04.) Although he applied for the two jobs referred to him by Ms. Dunn, Ms. Dunn complained that the Claimant failed to return her phone calls (EX 39, p. 8) and was uncooperative (EX 39, p. 100.) Ms. Dunn acknowledged, however, that the Claimant had missed their scheduled appointments on various occasions due to the effects of his pain medication, a lack of funds to put gasoline in his car, and mechanical car trouble. (EX 38, p. 6; EX 39, p. 23-24.)

Still, Ms. Dunn insisted that the Claimant jeopardized his ability to obtain jobs by "red flagging" himself in interviews. She described "red flagging" to mean revealing limitations or work restrictions. (EX 39, p. 37.) She explained that she conducted a mock interview with the

[9] The Claimant testified that he applied for all of the positions identified for him by Mr. Magnuson, except for the position of "counselor in a girls home," as he had no experience in counseling, had never dealt with teenage girls before, and simply "didn't want to put [him]self in that kind of position." (HT, p. 69-70, 155, 189-90.)

[10] The Claimant testified that he pawned his stereo to buy a computer program to assist him with writing his resume. (HT, p. 54.)

[11] Nora Dunne stated that the Claimant found his Econolodge position through Pikes Peak Work Force, a service she directed him to register with. (EX 39, p. 22.)

Claimant and instructed him not to reveal his work restrictions to employers during his first interviews. (EX 39, p. 35.) However, she believed that the Claimant initially disclosed his restrictions to potential employers, against her recommendation, and thereby sabotaged employment opportunities. (EX 39, p. 42.)

Mr. Rauer, the Director of Rehabilitation Services at FasTrak Rehabilitation and the next Rehabilitator to assist the Claimant, found the Claimant to be motivated. After conducting a vocational assessment of the Claimant on February 5, 2003, Mr. Rauer reported, "Mr. Gruginski appears to be very interested in returning to the competitive labor market as soon as possible; it is refreshing to be approached by an injured worker who is requesting good faith assistance in reemployment." (CX 22, p. 297.) Mr. Rauer found the Claimant's "motivation to return to work as well above average." (CX 22, p. 305.)

Ms. Howard, the last rehabilitation counselor to work with the Claimant, commented that the job market was tight (CX 24, p. 42) but that the Claimant still continued to apply for jobs. (CX 24, p. 21.) She found the Claimant to be "more cooperative than most" and noted that he never missed any appointments or failed to return her calls. (CX 24, p. 19.) Ms. Howard emphasized to the Claimant that she would give him job-seeking tools, but that he would have to be the one to use those tools to obtain a job. (HT, p. 114.) Ms. Howard reported that once she showed the Claimant how to use Colorado Job Bank to conduct a job search, he began submitting six resumes per week for property management jobs in several states. As mentioned above, the Claimant's use of the Colorado Job Bank led to his apartment management position at Park Meadows. (CX 23, p. 310-11.) Because his Park Meadows position only covered his $458 rent expense each month, the Claimant continued to look for work. He reported to Ms. Howard that he applied to Sears, Auto Zone, Home Depot, Safeway, King Soopers and Sara Lee. (CX 23, p. 311.)

The Claimant applied for the positions recommended by his vocational counselors as well as positions he located on his own. However, as he applied for jobs, he limited his capabilities more restrictively than appears warranted. Specifically, the Claimant had an impression that his capability was limited beyond the restrictions imposed by Dr. Sandell. Dr. Sandell initially indicated that the Claimant should be placed in a low stress environment (EX 43, p. 6), and Nora Dunne admitted that work of hotel desk clerks is stressful (EX 39, p. 69). However, Dr. Sandell later stated, "There are few, if any, jobs in the world today that do not involve some level of stress. I don't feel there is any reasonable and objective way to make a work restriction related to stress." (EX 31, p. 50.) Thus, the Claimant would have to adapt to some amount of stress in any work environment. The Claimant avoided jobs that were stressful, telling Ms. Howard that he had could not handle the stress of being a hotel desk clerk. (CX 24, p. 48.) He also expressed to Ms. Howard that he would be unable to stand on his feet all day as a security guard. (CX 24, p. 49-50.) These were restrictions that the Claimant determined for himself, not restrictions imposed on him by a physician. The Claimant's job search was also influenced by his belief that he could not perform a job that required frequent standing. In fact, the Claimant's FCE results, as acknowledged by Dr. Sandell, showed that the Claimant was specifically approved for frequent standing. (CX 14, p. 246; CX 17, p. 263.)

Despite the Claimant's perceived limitations, the Claimant applied for every job that each vocational counselor referred to him. To document his efforts, the Claimant kept job logs, which detailed his application and interview process, and addressed whether medical approval was obtained by his treating physician for each position suggested by each counselor. (CX 1-3.) The Claimant also presented evidence of records from potential employers acknowledging his job applications. (CX 4.) In sum, the Claimant kept detailed records of his job search and thereby demonstrated his diligence in seeking employment.

Although Bobby Morgan, the Assistant Claims Supervisor of Contract Claims Services, Inc., opined that the Claimant should have actually applied for one to two positions per day (HT, p. 210, 227-28), such a standard is unreasonable. The Claimant showed diligence by applying for the jobs identified for him by his vocational counselors and for additional jobs he found on his own. When he was unsuccessful in his job search, he pursued the approved option of real estate schooling and continued to persevere until he earned his real estate license. (HT, p. 126.) As Mr. Magnuson acknowledged, when an applicant is unsuccessful in job placement over a period of time, the next step is training in order to increase skill level. (HT, p. 199.) The Claimant's documented efforts clearly demonstrate that he followed the approved path set out for him by the OWCP.

The Claimant impressed three of the four vocational counselors with whom he worked as being diligent in his job search, and he kept meticulous records of his unsuccessful search for alternative work. Thus, I find the Claimant has succeeded in rebutting the Employer's showing of the availability of suitable alternative employment. As such, the Claimant's diligent but unsuccessful pursuit of suitable alternative employment allows him to retain his eligibility for total disability benefits.

4. The Claimant's Entitlement to Disability Benefits

Disability is generally addressed in terms of whether its nature is permanent or temporary and whether its extent is partial or total. With regard to nature, the Act defines disability as an "incapacity to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902 (10). Therefore, a claimant must demonstrate an economic loss in conjunction with a physical or psychological impairment in order to receive a disability award. *Sproull v. Stevedoring Services of America,* 25 BRBS 100, 110 (1991).

A condition is classified as permanent if it has continued for a lengthy or indefinite duration, *Crum v. General Adjustment Bureau,* 738 F.2d 474, 480 (D.C. Cir. 1984), or when it is chronic and there is no evidence of recovery within a normal healing period. *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP,* 592 F.2d 762, 764 (4th Cir. 1979). Accordingly, a claimant's disability is considered temporary if it exists before he reaches maximum medical improvement and permanent if it exists after he has reached maximum medical improvement. *See Trask v. Lockheed Shipbuilding & Construction Co.,* 17 BRBS 56, 60-61 (1985).

In this case, there is no medical evidence that the Claimant ever reached maximum medical improvement. Therefore, the Claimant is not entitled to permanent partial disability benefits. However, the Claimant is entitled to temporary total disability benefits from September

13, 2002, through March 31, 2003, the time period that he was unemployed and uncompensated. (EX 2, p. 1; EX 42, p. 1.) He is also entitled to temporary partial disability benefits beginning April 1, 2003, when he obtained employment through his own efforts.

5. The Claimant's Retained Earning Capacity

On April 1, 2003, the Claimant began his current position of apartment manager at Park Meadows Apartments. The Claimant's earnings consisted of $458.00 per month, in the form of a check that was automatically signed over to Park Meadows to cover his monthly rent. (HT, p. 44.) The $458.00 per month equates to a retained earning capacity of $105.69 per week (458 multiplied by 12 = $5,496, divided by 52 = $105.69).

At the start of the hearing, the parties stipulated that the Claimant's average weekly wage before his October 31, 2000, injury, was $298.00. (HT, p. 7.) Accordingly, the Claimant is entitled to temporary partial disability benefits, commencing on April 1, 2003, the day the Claimant started his position at Park Meadows Apartments, based on the Claimant's pre-injury average weekly wage of $298.00 and his retained earning capacity of $105.69.

CONCLUSIONS

In conclusion, the Claimant, who sustained injuries on October 31, 2000, while working for the Employer, has not yet reached maximum medical improvement. Although the Employer met its burden and showed the availability of suitable alternative employment for the Claimant, the Claimant rebutted the Employer's showing by proving that he diligently but unsuccessfully attempted to obtain suitable alternative employment. The Claimant is not entitled to permanent total disability benefits, but is entitled to temporary total disability benefits from September 13, 2002, through March 31, 2003, the time period that he was unemployed and uncompensated. The Claimant is entitled to temporary partial disability benefits beginning April 1, 2003.

ORDER

Based on the findings and conclusions set forth above, it is hereby ORDERED that:

1. Army & Air Force Exchange Service, and Contract Claims Services, Inc., its carrier, shall make payments to the Claimant for temporary total disability benefits from September 13, 2002, through March 31, 2003, based on an average weekly wage of $298.00 per week.

2. Army & Air Force Exchange Service and Contract Claims Services, Inc. shall make payments to the Claimant for temporary partial disability benefits beginning April 1, 2003, based on the difference between his pre-injury average weekly wage of $298.00 and his retained earning capacity of $105.69.

3. Air Force Exchange Service and Contract Claims Services Inc. shall pay interest on each past due unpaid compensation payment from the date the compensation became due until the date of actual payment at the rates prescribed under the provisions of 28 U.S.C. § 1961.

4. All computations are subject to verification by the District Director who, in addition, shall make all calculations necessary to carry out this Order.

5. Counsel for the Claimant shall prepare and serve an Initial Petition for Fees and Costs on the undersigned and on the Respondents' counsel within 20 calendar days after the service of this Decision and Order by the District Director. Within 20 calendar days after service of the fee petition, Respondents' counsel shall initiate a verbal discussion with the Claimant's counsel in an effort to amicably resolve any dispute concerning the amounts requested. If the two counsel agree on the amounts to be awarded, they shall promptly file a written notification of such agreement. If the counsel fail to amicably resolve all of their disputes, the Claimant's counsel shall, within 30 calendar days after the date of service of the initial fee petition, provide the undersigned and the Respondents' counsel with a Final Application for Fees and Costs which shall incorporate any changes agreed to during his discussions with the Respondents' Counsel and shall set forth in the Final Application the final amounts he requests as fees and costs. Within 14 calendar days after service of the Final Application, the Respondents' Counsel shall file and serve a Statement of Final Objections. No further pleadings will be accepted unless specifically authorized in advance. For purposes of this paragraph, a document will be considered to have been served on the date it was mailed.

6. The parties are ordered to notify this Office immediately upon the filing of an appeal.

A

JENNIFER GEE
Administrative Law Judge